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Theft, Law and Society (Book Review)

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BOOK REVIEWS

THEFT, LAW AND SOCIETY. By Jerome Hall. Boston: Little, Brown & Co., 1935, pp. xxxv, 360.

Times and statutory laws change, but man and his problems in the administration of the criminal law remain the same. We have the author's report of a celebrated case at Pevensey:

"A man was charged with stealing a pair of breeches, and the evidence being clear, the jury brought in a verdict of guilty. Just before the magistrate was about to pronounce sentence of death, the clerk informed the jurors that the offense was capital. The jurors were dismayed, and sought immediately to modify their verdict. One suggested that the word NOT be inserted before GUILTY; another desired the discharge of the prisoner without any formality. This being impossible, it was decided to adjourn court and consult Mr. Willard, a local counsellor of eminence. It happened that the chief baron and another judge were dining with Mr. Willard when the deputation recommended that the best way out was to insert after the word GUILTY, the words OF MANSLAUGHTER. The jurors were delighted, and returned in triumph to the courtroom, where the defendant, tried for stealing a pair of breeches, was convicted of manslaughter—a verdict which, of course, would have to be set aside."

Then, as now, it seems that harsh and severe statutory law repugnant to the sense of fairness of judges and juries, was often evaded by legal fiction or other methods of escape in order to cause judicial decision to reflect the obtaining sentiment and traditions of the period.

I

The problem of crime and its elimination is necessarily deeply concerned with the social significance of human behavior. Rules of law have always reflected the civilization of a society at any given time, though their interpretation and enforcement are always more or less affected by the prejudices and property interests of the moment.

A presentation that contented itself with a bare statement and exposition of this generally known and accepted fact would be of doubtful value. Mr. Hall, however, deals with this subject in a manner that covers the entire fabric of statutory crime, its judicial evolution both as to origin and final culmination. The rules and technique applied in the administration of criminal law by the courts necessarily change because of the requirements of an expanding society and by reason of the fact that additional protection for commercial development is needed. The law in this respect is the enforcing arm of the social and economic interests of a society; it is never justice in itself.

Mr. Hall sets forth methods adopted by courts in changing the law while at the same time rendering homage to the shibboleth, "*stare decisis*." This

result is accomplished in two ways: By deliberately holding that the theory of old cases clearly implied the newly desired proposition; or by reading criminal significance into acts which prior case law had not branded with the stigma of criminality. The first method is generally recognized as intellectually dishonest; whereas the second method, admittedly equally unfair to a defendant, is often justified by writers as a necessary mental attitude of the courts which finds its genesis and justification in a desire to fit existing rules to a changing society. It is true that the absence of necessary legislative enactment compels the courts through judicial legislation to change the criminal law from time to time in order to serve the community in its varying needs; but these needs would be more adequately met through new statutory declaration, rather than by distorting the theory of "prior decision."

II

An interesting manipulation of legal concepts is to be found in the term, "Benefit of Clergy," an expression often used but seldom understood. In England crimes were divided into clergyable and non-clergyable offenses. For the latter category the death penalty was mandatory. From the middle of the 14th century to the 19th century, the doctrine of "Benefit of Clergy" provided for judges and juries an additional device to mitigate the rigors of capital punishment provided as the penalty for some two hundred non-clergyable offenses. By finding the defendant to be entitled to benefit of clergy, he was saved.

Benefit of clergy was extended during this period of five centuries from an ecclesiastical privilege to a general right; but at the same time the number of statutory non-clergyable offenses constantly increased. Parliament held that capital punishment was the only suitable penalty for an increasing number of offenses so that there was really a strife between Parliament and juries. In practice juries nullified these statutes by finding defendants guilty of "clergyable" rather than "non-clergyable" offenses, although a finding that a "non-clergyable" offense had been committed was warranted by the evidence. For example, when stolen chattels were worth an amount that would necessitate the imposition of the capital penalty, it became customary for juries arbitrarily to fix worth at a lesser amount so that the penalty of transportation based on a "clergyable" felony might be imposed.

This custom of juries, in its day branded as "perjury" by contemporaries who believed that the imposition of heavy penalties would deter crime, was one of the determining factors that led to the rewriting and humanizing of the English criminal statutes in order to encourage juries to return verdicts consonant with the evidence. The real difficulty, then as now, was the law's "lag"; the obvious inability to change statute law immediately and adequately to meet new social conditions, and the hysterical public reaction to this unavoidable condition.

III

The evolution of the English law of larceny, a measure designed to protect property under an early feudal civilization, is interestingly explained. Anglo-Saxon England was a primitive agricultural community, and the property which

required protection consisted of horses, oxen and other movables. It was the asportation of movable personal property done with the intention to steal that was condemned and made criminal. Thus, deeds, which merely evidenced an interest in or ownership of lands, were not considered to be tangibles subject to larceny. The primitive farming community required no such protection, for deeds to land were not negotiable and no loss of the realty came to the fee owner through their theft. It will be recalled that when late in the 18th century, England took on the appearance of a capitalistic society in succession to its earlier feudal state, the law merchant was created to give protection to those who dealt in the open market, as distinguished from the landowning classes. As the merchant class grew more powerful and its commitments more involved, deeds, though they remained only evidence of real property ownership, were treated as tangible property for larceny charges.

A further element determining the possible subject matter of larceny was the presumption that the movable chattel is a thing of value. While the early common law by self-declaration covered all personal property having value, it covered in fact only such personal property as was generally owned by the propertied class. Hales, J., in the reign of Edward VI, "thought it no felony to take a diamond, rubie or other such stone (not set in gold or otherwise) because they be not of price with all men, howsoever some do hold them both dear and precious." An interesting question is at once presented. Was the decision of Hales predicated on the fact that a "diamond or rubie" actually had no ascertainable value or was it based on the fact that the subject matter of larceny as well as the acts constituting it had become so fixed in judicial mind by precedent, that the court was loath in the absence of social pressure to extend the category of movables that might constitute the subject of larceny? It would be expected that as jewels became more universally owned, pressure on the part of owners would lead the court to hold that jewels might constitute the subject matter of larceny. This result, of course, did follow in a later decision.

The author cites the poaching laws as another victory for ownership; they were made to apply to the taking of animals *ferae naturae*. This example is treated by him as illustrative of the point that the pressure of wealthy influential groups—in this case large landowners—frequently resulted in making an act illegal which theretofore had been regarded as an accepted right.

The treatment of the receiver of stolen goods is dealt with both as an historical and a contemporaneous problem. Mr. Hall's approach makes it apparent that our failure to cope adequately with this subject and all its crime-breeding ramifications is due to the inability of the various legislatures to differentiate by appropriate legislation between the two great classes of "receivers." The first class consists of persons who purchase on an isolated occasion stolen goods for personal consumption against whom juries are reluctant to invoke severe penalties. The second consists of those persons commonly called professional receivers, who purchase stolen goods for resale and who thus deal in them habitually and on a large scale. Apparently criminal statutes with regard to "receiving" should be redrafted so that the same penalties should not equally apply to both types of offenders.

To curb professional receivers effectively our substantive criminal law must be changed so that the problem be dealt with in the light of its factual

background. Knowledge that the articles in question have been stolen should be imputable from the fact that the receiver has in his possession articles that have been stolen from other owners. In addition such possession should brand the receiver as a professional dealer in stolen goods, with a resultant severer penalty. Though non-professional receivers also encourage thieving, they represent a distinct social problem which should be dealt with in a separate category.

There are devices used at the present time in our own country to avoid the over-severity of penalty for those who happen to lapse into the commission of a crime unattended by the element of actual felonious intent. In Illinois, such a situation exists in connection with the crime of auto-stealing. In that state, there is a misdemeanor statute applicable to a chauffeur who uses the automobile of his employer without the latter's permission. In Chicago, today, pleas of guilty to this misdemeanor are accepted from those who steal cars for "joy riding," in order to avoid the imposition of the severe felony sentence provided for the theft of automobiles.

IV

In his treatise on petty larceny the author advocates a definite step for the adequate protection both of the wrongdoer and of society by an enlightened administration of the penal law. Petty larceny as a crime does not arouse great public indignation (New York and other states expressly permit compounding certain misdemeanors of which petty larceny is one); frequently it is the subject of amateur endeavor. The suggestion is made that new social machinery be erected for the rehabilitation of character of such petty offenders and for the prevention of recidivism. Records will thus be acquired of the number and type of misdemeanants so handled and the effect on them of the proposed preventive treatment. Conclusions drawn therefrom may be invaluable in determining what aspects in the administration of criminal law should be altered so as to provide for a wiser method of approach to the other categories of crime.

Water, however, will not rise above its own level. To translate Mr. Hall's view into conduct would require a type of official unfortunately rare in government service. The indignant citizen, speaking through present-day conferences on crime, urges once more, "Let us make the punishment severe; let us close the doors of escape to the criminal." The treatment thus demanded is as inefficacious as it is old. It is based on an unwillingness or inability to recognize what is now known to be an established fact, that laws can be only as effective as the nature of those who are chosen to enforce them. Humane intelligence and high character do not as yet constitute the golden key to public office; and in consequence the administration of the criminal law must continue to fall far short of its proper goal.

Though it is common practice to speak disparagingly of jurors, it is the reviewer's opinion that the jury system stands established as the strongest link in the administration of law. Statutes are only abstractions, but man has a controlling conscience. The jury, infinitely better than an abstraction, can appraise justice in each individual case. Clamor and pressure can bring forth

statutes making it a capital offense to steal a pair of breeches, but a statute cannot constrain a jury to pronounce unjustly the irretrievable judgment.

*We recall a celebrated case at Pevensey: * * **

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THE NEED FOR CONSTITUTIONAL REFORM. By William Yandell Elliott. New York: Whittlesey House, McGraw-Hill Book Co., Inc., 1935, pp. xi, 286.

Thanks are due to Prof. Elliott for defining with such clarity and directness the major political problem which confronts us. The complexities and demands of an industrialized civilization have overwhelmed a governmental system fashioned by a simple society in accordance with ideas that were derived from an even earlier and more primitive economy. With force and particularity, Prof. Elliott establishes the inadequacy of our political machinery, its inability successfully to order and direct the bewildering forces of modern life. There is clearly a need for constitutional reform.

But, if Prof. Elliott's clinical findings are accurate, his diagnosis lacks the penetration one may expect from him and the remedies which he prescribes are far from enough to effect a cure. For him the chief vice is patronage. While one may readily concede that this is a vexatious evil, it scarcely deserves the major role ascribed to it. Even the complete eradication of patronage and the firm establishment of both appointments and promotions on the basis of merit will not take us far towards a solution of our problem. Patronage, rather than being a prime cause, is itself only a resultant of the operation of the hidden forces which have brought into existence the powerful party machines that dominate our political life and bend public officers to their will. A thorough understanding of the character and workings of these forces, to be gained only by searching inquiry, is preliminary to any effort at reform.

Nor can I subscribe to the criticism of our legislatures and to the doctrine that salvation lies in the elevation of the executive. I retain a great regard for our legislatures. It is difficult for me to see how we can preserve political democracy without making sure that the formulation of major policy shall continue in the hands of representative legislative bodies. Before we pin our faith altogether to the executive, let us remember the blunders that we have witnessed in that department. There is nothing in recent administrations to inspire any great confidence either in executive capability or in its wisdom. The major mistakes of recent régimes may be attributed to executive policy rather than to a Congress which has oftentimes yielded reluctantly to the demands of insistent administrative officers. Much that has been written and said to discredit our legislatures comes from sources that are too obviously interested to be swallowed whole.

Rather than subordinating the legislative branch to the executive, we would do better to integrate the two. The check and balance system of which, curiously enough, we are so proud, is far more responsible for inefficiency and